



**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JEFF HOHLBEIN,

Plaintiff,

v.

MARSTON, INC., d/b/a/ "THE GENERAL  
STORE," UTAH LAND RESOURCES LLC,  
and DOES ONE through FIFTY, inclusive,

Defendants.

3:08-cv-00347-BES-VPC

**ORDER**

On January 23, 2009, Defendants filed a Motion for Summary Judgment (#12). Plaintiff Jeff Hohlbein ("Hohlbein") filed an Opposition (#15) on February 24, 2009 and Defendants did not file a reply. On June 3, 2009, Plaintiff filed a Motion for Summary Judgment (#16). Defendants did not file an opposition, nor did they seek an extension of time in which to do so. Accordingly, Hohlbein filed a Reply (#17) on June 25, 2009, in which he requests that judgment be entered against Defendants on the grounds that Defendants failed to oppose the summary judgment motion, no genuine issues of material fact remain to be resolved, and Plaintiff is entitled to judgment as a matter of law.

**I. BACKGROUND**

Plaintiff uses a wheelchair due to a condition known as fibrodysplasia ossificans progress. On March 23, 2008, Plaintiff visited The General Store, a small convenience store and gas station located in Moundhouse, Nevada, and encountered a restroom that was inaccessible to persons with disabilities, as well as other accessibility barriers. Based on this

1 alleged denial of full and equal access to a public accommodation, on June 24, 2008 Plaintiff  
2 filed a Complaint against Defendants, the property owner and operator of The General Store,  
3 seeking to enjoin them from violating Title III of the Americans with Disabilities Act ("ADA"), 42  
4 U.S.C. § 12101, et seq. According to Hohlbein, Defendants have violated the ADA by failing  
5 to remove the architectural barriers to access which were encountered when he visited The  
6 General Store.

## 7 II. ANALYSIS

### 8 A. Legal Standards

9 Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers  
10 to interrogatories, and admissions on file, together with the affidavits, if any, show that there  
11 is no genuine issue as to any material fact and that the moving party is entitled to judgment  
12 as a matter of law." Fed.R.Civ.P. 56(c). The burden of demonstrating the absence of a  
13 genuine issue of material fact lies with the moving party, and for this purpose, the material  
14 lodged by the moving party must be viewed in the light most favorable to the nonmoving party.  
15 Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Martinez v. City of Los Angeles, 141  
16 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the  
17 litigation and requires a trial to resolve the differing versions of the truth. Lynn v. Sheet Metal  
18 Workers Int'l Ass'n, 804 F.2d 1472, 1483 (9th Cir. 1986); S.E.C. v. Seaboard Corp., 677 F.2d  
19 1301, 1306 (9th Cir. 1982).

20 Once the moving party presents evidence that would call for judgment as a matter of  
21 law at trial if left uncontroverted, the respondent must show by specific facts the existence of  
22 a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "[T]here  
23 is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury  
24 to return a verdict for that party. If the evidence is merely colorable, or is not significantly  
25 probative, summary judgment may be granted." Id. at 249-50 (citations omitted). "A mere  
26 scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which  
27 the evidence is reasonably susceptible; it may not resort to speculation." British Airways Board  
28 v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978); see also Daubert v. Merrell Dow

1 Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993) (“[I]n the event the trial court concludes that  
 2 the scintilla of evidence presented supporting a position is insufficient to allow a reasonable  
 3 juror to conclude that the position more likely than not is true, the court remains free . . . to  
 4 grant summary judgment.”). Moreover, “[i]f the factual context makes the non-moving party’s  
 5 claim of a disputed fact implausible, then that party must come forward with more persuasive  
 6 evidence than otherwise would be necessary to show there is a genuine issue for trial.” Blue  
 7 Ridge Insurance Co. v. Stanewich, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing Cal.  
 8 Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir.  
 9 1987)). Conclusory allegations that are unsupported by factual data cannot defeat a motion  
 10 for summary judgment. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

11 The failure of an opposing party to file points and authorities in response to any motion  
 12 shall constitute a consent to the granting of the motion under Local Rule 7-2(d). However, the  
 13 absence of opposition to a motion for summary judgment does not change the moving party’s  
 14 burden of proof. See Marshall v. Gates, 44 F.3d 722, 724 (9<sup>th</sup> Cir. 1995). “A nonmoving  
 15 party’s failure to comply with local rules does not excuse the moving party’s affirmative duty  
 16 under Rule 56 to demonstrate its entitlement to judgment as a matter of law.” Martinez v.  
 17 Stanford, 323 F.3d 1178, 1181 (9<sup>th</sup> Cir. 2003). The Court has fully considered Plaintiff’s Motion  
 18 for Summary Judgment, the evidence presented, and applicable law. Plaintiff has affirmatively  
 19 demonstrated his entitlement to summary judgment by showing that there is no genuine issue  
 20 of material fact and he is entitled to judgment as a matter of law as to the allegations made  
 21 against Defendants. As such, Plaintiff’s Motion for Summary Judgment is granted and  
 22 Defendants’ Motion for Summary Judgment is denied.

## 23 **B. Plaintiff’s ADA Claim**

24 Title III of the ADA prohibits places of public accommodation from discriminating against  
 25 disabled individuals. 42 U.S.C. § 12182(a). The ADA prohibits many specific types of  
 26 discrimination, including the “failure to remove architectural barriers . . . where such removal  
 27 is readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). If a place of public accommodation fails  
 28 to remove architectural barriers where such removal is readily achievable, the ADA provides

1 for a private right of action. 42 U.S.C. § 12188(a)(1). Only injunctive relief is available as a  
2 remedy under Title III of the ADA, including an injunction requiring the defendant to alter  
3 facilities to make such facilities "readily accessible to and usable by persons with disabilities,"  
4 or, where appropriate, "requiring the provision of an auxiliary aid or service, modification of a  
5 policy, or provision of alternative methods." 42 U.S.C. § 12188(a)(2).

6 Defendants move for summary judgment on the grounds that: (1) Plaintiff's ADA claim  
7 has been resolved because the alleged architectural barriers have been remedied; and (2)  
8 the Court should not award attorney's fees to Plaintiff in this case. However, Defendants have  
9 presented no evidence to support their contention that the barriers identified by Plaintiff have  
10 been removed. Furthermore, in support of his summary judgment motion, Plaintiff submits  
11 the declaration and expert witness report of C. Jeffery Evans, identifying the barriers existing  
12 at The Grocery Store as of February 18, 2009. (Motion (#16), Ex. 1 of Ex. C). The Court finds  
13 that the barriers identified by Plaintiff's expert constitute violations of the ADA. Plaintiff also  
14 provides evidence that Defendants have conceded that removal of all barriers to access is  
15 readily achievable. (Motion (#16), Ex. E).

16 Defendants have not presented any evidence from which a reasonable trier of fact  
17 could determine that removing the identified barriers to access is not readily achievable. For  
18 the foregoing reasons, there is no genuine issue of material fact as to whether Defendants  
19 have violated the ADA by failing to remove the barriers. Accordingly, the Court grants  
20 Plaintiff's request for an injunction requiring Defendants to remove the barriers to accessibility  
21 at The Grocery Store.

### 22 III. CONCLUSION

23 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary  
24 Judgment (#16) is GRANTED. Accordingly, Plaintiff's request for injunctive relief is GRANTED  
25 and Defendants are ordered to remove the barriers to accessibility identified by Plaintiff's  
26 expert within ninety days of the entry of judgment.

1 IT IS FURTHER ORDERED that Defendants' Motion for Summary (#12) is DENIED.  
2 The clerk of the court shall enter final judgment accordingly.

3 DATED: This 30<sup>th</sup> day of July, 2009.  
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10 UNITED STATES DISTRICT JUDGE  
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